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**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-1384

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SUPREME COURT, U.S.

UNIROYAL, INC., TIRE BRANDS, INC., WICKLAND OIL CO.,
BIG O TIRE DEALERS, INC.,
Petitioners,

VS.

JAVELIN CORPORATION,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

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Petitioners respectfully pray that a writ of certiorari issue to review certain portions of the decision and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 12, 1976. That decision and opinion reversed portions of the judgment in favor of Petitioners which had been entered by the United States District Court for the Northern District of California.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 546 F.2d 276. A copy of the opinion

as reported therein is attached to this Petition as Appendix A. The District Court wrote no opinion. Its Order granting defendants' motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., is attached to this Petition as Appendix B.

JURISDICTION

The Court of Appeals entered judgment on October 12, 1976. Defendants' Petition for Rehearing with Suggestion for Rehearing en Banc was denied by the Court of Appeals on January 13, 1977 in an unpublished Order. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

At issue are the legal standards governing application of the *in pari delicto* doctrine in private antitrust litigation. The court below has held, in purported reliance upon *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), that a plaintiff who has voluntarily participated in and actively furthered an alleged illegal conspiracy is not barred from recovering damages unless he also "participated in the formation of the conspiracy", and then only if "the illegal conspiracy would not have been formed but for the plaintiff's participation." (Opinion, pp. vi-vii). In thus conditioning application of the *in pari delicto* doctrine upon the singular fact of a plaintiff's "but for" origination of an illegal conspiracy, the decision of the Court of Appeals raises questions of major importance to future antitrust litigation.

Specifically, the questions presented for review are these:

1. Is the *in pari delicto* doctrine in private antitrust litigation, as a matter of law, restricted to cases in which the plaintiff's participation in the formation of the alleged illegal conspiracy was so dominant that the conspiracy would not have been formed but for the plaintiff's participation?
2. Is a trial court barred from considering fundamental principles of "equal fault" and thereby precluded from applying the doctrine of *in pari delicto* to a party which encounters an existing unlawful scheme, voluntarily seeks membership therein, and actively participates in, furthers and benefits from the alleged illegality?

STATUTES INVOLVED

The applicable statutes are 15 U.S.C. §§1 and 15. They provide, in pertinent part, as follows:

15 U.S.C. §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

15 U.S.C. §15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

A. Nature of the Case.

This is a private antitrust action brought by one of the largest tire distributing companies in the United States (Javelin Corporation) against certain other such distributors (Wickland Oil Company and Big O Tire Dealers, Inc.),¹ the buying group to which the plaintiff and those distributor defendants belonged (Tire Brands, Inc.)² and one of the manufacturers of "Sonic" brand tires (Uniroyal, Inc.). The Complaint alleged three counts of violations of Section 1 of the Sherman Act. Specifically, Count I alleged a horizontal conspiracy to allocate exclusive territories; Count II alleged a tie-in agreement based on the assertion that distributor members of Tire Brands were required to purchase common stock in the corporation as a condition of their membership; Count III alleged that the defendants had boycotted Javelin by terminating its membership in Tire Brands. Javelin sought treble damages; it also sought an injunction requiring defendants to continue to sell its products on the same basis as in the past.

¹The Complaint names as defendants all the distributors of Sonic tires (other than plaintiff) and two individuals. It was dismissed as to all of those defendants except Wickland Oil Company and Big O Tire Dealers, Inc., for lack of jurisdiction and venue.

²Tire Brands, Inc. and its predecessors, Sonic Distributors, Inc. and Olympic Distributors, Inc., will all be referred to herein as "Tire Brands". Javelin Corporation will be referred to herein as "Javelin".

Petitioners' Answers, so far as here pertinent, alleged that plaintiff's claims are barred by plaintiff's voluntary, active and equal participation in the very agreements and arrangements its complaint attacks.

B. Javelin's Course of Dealing with Tire Brands.

Tire Brands was founded in 1962 by several tire distributors as a means of pooling their purchasing power. In order to ensure continuous volume purchasing, each distributor member was required to satisfy an agreed purchase volume of Tire Brands products. (Opinion, p. ii). It is alleged that the corporate arrangement included an agreement among the distributor members allocating to each an exclusive territory—an agreement violative of the rule this Court announced a decade later in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).³

Shortly after its formation in 1967 as a tire distributor, Javelin contacted the Tire Brand buying group for the purpose of furthering its economic interests by joining the arrangement. As the Court of Appeals noted, Javelin claims it was poorly capitalized and could not independently finance a private brand; hence membership in a purchasing group with an identified brand of tires appeared desirable. (Opinion, p. ii).⁴

Javelin became a member of Tire Brands in 1968 and thereafter participated in the marketing arrangement

³This Petition for Writ of Certiorari proceeds on the premise—disputed both factually and legally in the District Court—that the arrangements among Tire Brands members violated Section 1 of the Sherman Act.

⁴Tire Brands purchased tires primarily from Uniroyal, Inc. which produced a tire for it trademarked "Sonic". (Opinion, p. ii).

it now attacks. Javelin initially obtained North Dakota, South Dakota, Minnesota, Iowa, Wisconsin and part of Michigan as its marketing area. As described by the Court of Appeals, Javelin joined Tire Brands "fully aware of and subject to the quota and territory requirements. It considered the exclusive marketing area an advantage." (Opinion, p. ii).

Javelin's business proved successful. In the spring of 1968 it wanted more territory and asked Tire Brands to assign it the states of Michigan and Illinois. At that time Michigan and Illinois, among other areas, were "open" territories; that is, any member, including Javelin, could sell or solicit sales in those states. In fact, Javelin was selling Tire Brands products in Michigan and Illinois, but it was dissatisfied with that arrangement and requested the exclusive right to distribute the Sonic brand in those areas. It made a similar request for exclusive distribution in the New England and Pacific Northwest states as well. These requests were denied. Nevertheless, Javelin continued to flourish and in 1969 commenced marketing three tire brands of its own in competition with other members.

As a member of Tire Brands, Javelin prospered at a meteoric rate. Its sales increased from \$949,834 in 1967 (the first year of its existence) to \$17,316,036 in 1972 (the last year it was a Tire Brands member). During the same period its purchases of Tire Brands products declined steeply. (Opinion, p. viii n.4). Javelin's membership in Tire Brands was properly terminated in 1972 for its continued failure to meet its purchase quota obligations. (Opinion, p. ix). At the time its membership was terminated, Javelin was "one of the largest tire distributing companies in the United States." (Opinion, p. iii).

While it is thus true that a buying group was in existence prior to Javelin's membership in it, it is equally true, as the Opinion of the Court of Appeals recites, that Javelin was "fully aware" of the pertinent facts and "voluntarily sought membership in the group and actively participated in and benefitted by its restraints." (Opinion, pp. ii and vii).

C. Proceedings Below.

Javelin filed suit in the United States District Court for the Northern District of California on January 26, 1973. During a preliminary hearing on April 19, 1974, the District Court suggested that defendants' *in pari delicto* defense be tested by an appropriate motion. Defendants thereafter moved for summary judgment, arguing that Javelin was barred from recovering damages allegedly resulting from the territorial arrangements which it sought, furthered and supported while a member of Tire Brands. After briefs were filed and argument heard, the motion was granted and judgment entered on January 15, 1975. (Appendix B). In granting the motion, the District Court held that there was no triable issue of fact with respect to plaintiff's equal and active participation in and advancement of the assignment of exclusive territories. That holding is unquestioned by the Ninth Circuit in the ensuing appeal.

On appeal, a three-judge panel of the Court of Appeals affirmed the order granting summary judgment in favor of defendants as to Count III of the Complaint—the alleged retaliatory refusal to deal. The Panel, however, reversed the District Court on the *in pari delicto* issue and announced a rule of law which precludes both judge and

jury from evaluating Javelin's own responsibility for the conduct of which it now complains. Thus spoke the Court:

"[T]he mandate of *Perma Life* and the policy behind it demand that such circumstances [application of *in pari delicto*] be rare, and limited to where a plaintiff has participated in the formation of the conspiracy.

"Accordingly, we hold that summary judgment for the defendant [*sic*] was improperly granted in this case. A plaintiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff's participation. To satisfy this test, the jury must necessarily find that the degree of participation of the plaintiff must be equal to that of any defendant and a substantial factor in the formation of the conspiracy. The instigator of an illegal scheme clearly is barred under this test. Whether founding members of a conspiracy are barred is a question of fact for the jury based on the above test." (Opinion, pp. vi-vii).

Under this holding, a party such as Javelin which joins and furthers a pre-existing illegal scheme is immunized from *in pari delicto* considerations as a matter of law. If—but only if—the plaintiff was "present at the creation" is it subject to the potential bar of joint participation and then only if the creation would not have occurred "but for" its actions. It is this "but for" test keyed to the act of procreation which takes the holding beyond the ordinary and renders it appropriate for consideration by this Court.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH THE FLEXIBLE IN PARI DELICTO DOCTRINE CONTEMPLATED BY PERMA LIFE.

While this Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), stands for the proposition that mere participation in an illegal scheme does not necessarily bar a party from suing, that decision does not betoken an inflexible rule of the type fashioned by the Ninth Circuit which would establish as a matter of law the timing and degree of joint participation sufficient to trigger the "equal fault" doctrine. To the contrary, *Perma Life*—whatever its ambiguity in other respects⁵—recognizes the importance of preserving flexibility in the application of the *in pari delicto* doctrine and to that end requires the trier of fact to appraise the plaintiff's over-all conduct vis-a-vis the illegal scheme—not simply the happenstance of his involvement at the incipency—in order to ascertain whether full and equal involvement bars suit.

Perma Life involved a conspiracy among a parts manufacturer and its sales subsidiary to impose on their dealers franchise agreements which obligated the dealers, among other things,

- (1) to purchase all their requirements from defendants,
- (2) to sell at resale prices fixed by defendants,
- (3) to sell at locations fixed by defendants,
- (4) to carry a complete line of defendants' products, and

⁵See *infra*, pp. 15-17.

(5) to refrain from dealing with defendants' competitors.

The facts proved that plaintiffs were not active participants in the illegal scheme, but "to the contrary, that the illegal scheme was thrust upon them. . . ." 392 U.S. at 141.

This Court held that it would "undermine the anti-trust acts" to deny recovery to plaintiffs "merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others." 392 U.S. at 139. As explained by the opinion of the Court, in which Chief Justice Warren and Justices Black, Douglas, Brennan and White⁶ joined:

"Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. . . . The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages, but once it is shown that *the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it*, his understandable attempts to make

⁶Justice White also authored a separate opinion.

the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him." 392 U.S. at 139-140 (emphasis added).

The need to evaluate all the facts to determine whether plaintiff did "aggressively support and further the monopolistic scheme" is reinforced by the four separate opinions of the other Justices:

1. Justice Fortas:

"If the fault of the parties is reasonably within the same scale—if the 'delictum' is approximately 'par'—then the doctrine should bar recovery. . . . One co-adventurer could not sue the other for discriminatory or restrictive practices which allegedly diminished its take from the enterprise." (392 U.S. at 147).

2. Justice Marshall:

"[W]here a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should be barred from imposing liability on the defendant." (392 U.S. at 149).

3. Justices Harlan and Stewart:

"Plaintiffs who are truly in *pari delicto* are those who have themselves violated the law in cooperation with the defendant." (392 U.S. at 153).

4. Justice White:

". . . I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them There will be little mystery as to what evidence would be relevant

proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under §1; proof of whether one party attempted to terminate the arrangement and encountered resistance or countermeasures from the other; facts showing who ultimately profited or suffered from the arrangement.” (392 U.S. at 146-147).

Nowhere in these multiple opinions is there even the suggestion that it is proper for a court to transmute the complex question of a plaintiff's equality of fault into the simplistic inquiry of whether the agreement would not have been formed but for the plaintiff's participation. Petitioners submit that in selecting one fact from the many as an immutable litmus test for application of the *in pari delicto* doctrine, the Ninth Circuit has negated the clear teaching of *Perma Life*: that multiple factors are relevant in determining whether a plaintiff's “equal fault” ought to bar its suit for treble damages. Put otherwise, the transcendent rule fashioned by the Ninth Circuit cannot be harmonized with this Court's decision in *Perma Life*.

**B. THE DECISION BELOW IS INCONSISTENT WITH THE PRO-
NOUNCEMENTS OF ALL CIRCUIT COURTS WHICH HAVE
CONSIDERED THE IN PARI DELICTO DOCTRINE SUBSE-
QUENT TO THE DECISION IN PERMA LIFE.**

In the ensuing nine years since *Perma Life* no court has pronounced a “but for” standard remotely approaching that promulgated by the Ninth Circuit here. Indeed,

the Ninth Circuit itself had previously identified the plaintiff's responsibility for originating illegal conduct as only one of several facts establishing the “high degree of involvement in the illegal act” sufficient to constitute a defense under *Perma Life*. *Dreibus v. Wilson*, 529 F.2d 170, 174 (9th Cir. 1975); *sed quaere Calnetics Corporation v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3345 (U.S. Nov. 8, 1976). Elsewhere, the various circuits have indicated that all facts showing differences between co-actors' participation must be evaluated as a prerequisite to a reasoned application of the defense.⁷ See, e.g., *Greene v. General Foods Corporation*, 517 F.2d 635, 647 (5th Cir. 1975) *cert. denied*, 424 U.S. 942 (1976) (“It was an overmatch, not ‘compensated dishonor among thieves.’”); *Columbia Nitrogen Corporation v. Royster Company*, 451 F.2d 3, 15-16 (4th Cir. 1971) (“... when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other. [Footnote omitted.]”); *Premier Electrical Construction Company v. Miller-Davis Company*, 422 F.2d 1132, 1138 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970) (“Many factors are . . . rele-

⁷It is significant that when the courts have been presented with the *in pari delicto* defense in the context of securities fraud litigation, they have retained a comprehensive perspective which looks to the competing policies at issue and have refused to sanction any inflexible formula for determining the applicability of the doctrine to a particular case. See, e.g., *Woolf v. S. D. Cohn & Company*, 515 F.2d 591, *rehearing denied*, 521 F.2d 225 (5th Cir. 1975), *vacated*, 44 U.S.L.W. 3737 (U.S. June 21, 1976); *James v. DuBreuil*, 500 F.2d 155 (1974); *Kuehnert v. Texstar Corporation*, 412 F.2d 700 (5th Cir. 1969); *Can-Am Petroleum Company v. Beck*, 331 F.2d 371 (10th Cir. 1964).

vant in determining whether participation by the plaintiff in an illegal agreement constitutes a defense to his treble damage action.”). See also *Kestenbaum v. Falstaff Brewing Corporation*, 514 F.2d 690, 695 n.4 (5th Cir. 1975); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).⁸

These *in pari delicto* authorities from the Fourth, Fifth, Sixth and Seventh Circuits are consistent with the general conspiracy rule that one who joins an ongoing conspiracy is not thereby automatically immunized from liability. Indeed, he is as responsible to third parties for the conspiracy as are the founding members, and is liable for all that has previously been done pursuant to it. See, e.g., *United States v. Lester*, 282 F.2d 750 (3d Cir. 1960), *cert. denied*, 364 U.S. 937 (1961); *Lefco v. United States*, 74 F.2d 66 (3d Cir. 1934); *Baughman v. Cooper-Jarrett, Inc.*, 391 F.Supp. 671 (W.D. Pa. 1975), *modified*, 530 F.2d 529 (3d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3250 (U.S. Oct. 4, 1976); *Ratner v. Scientific Resources Corporation*, 53 F.R.D. 325 (S.D. Fla. 1971), *appeal dismissed*, 462 F.2d 616 (5th Cir. 1972); *Charles Rubenstein, Inc. v. Columbia Pictures Corporation*, 154 F.Supp. 216 (D. Minn. 1957). This body of accepted law cannot be squared with the rule announced below that a party who comes into a pre-existing conspiracy can *never* be subject to an “equal fault” bar.

⁸For general discussions of the *in pari delicto* doctrine see Handler, *Through the Antitrust Looking Glass—Twenty-first Annual Antitrust Review*, 57 Calif.L.Rev. 182 (1969); Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 Harv.L.Rev. 1241 (1965).

To be sure, the timing of one’s participation in an illegal conspiracy *may* actually distinguish one’s role from that of other participants; but no prior case has attached dispositive significance to timing alone. Less still is there precedent for distinguishing among the “founding members” on a “but for” or any other standard. In short, the rule announced by the Ninth Circuit is shorn of all antecedents, *Perma Life* not excepted.

C. THIS PETITION PRESENTS AN APPROPRIATE OPPORTUNITY FOR THIS COURT TO PROVIDE MUCH NEEDED GUIDANCE IN AN IMPORTANT AREA OF ANTITRUST JURISPRUDENCE.

The only occasion on which this Court has considered the application of the *in pari delicto* doctrine to private antitrust litigation was in *Perma Life Mufflers, Inc. v. International Parts Corp.*, *supra*. That decision resulted in five separate opinions. All Justices concurred that the Court below had improperly affirmed summary judgment for defendants because the facts there presented were insufficient to make out the defense.⁹ There was little agreement, however, on what facts would be sufficient. The Opinion of the Court left undecided the case of a plaintiff who “aggressively support[s] and further[s] the monopolistic scheme as a necessary part and parcel of it”. 392 U.S. at 140. Justices White, Fortas and Marshall distinguished the facts in *Perma Life* from cases which might arise in the future. They would bar the suit of a participant in an illegal scheme if (1) he bore “substan-

⁹Seven Justices agreed that the action should be remanded for trial. Justices Harlan and Stewart would remand for further summary procedures prior to trial. 392 U.S. at 156.

tially equal responsibility" for it (Justice White, 392 U.S. at 146); or (2) the "fault of the parties is reasonably within the same scale" (Justice Fortas, 392 U.S. at 147); or (3) he "actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault" (Justice Marshall, 392 U.S. at 149). Justices Harlan and Stewart similarly distinguished other cases and stated that the doctrine should be applied to the suits of those plaintiffs "who have themselves violated the law in cooperation with the defendant." 392 U.S. at 153.

The multiple opinions of this Court in *Perma Life* have provided the lower courts with little guidance. As the Ninth Circuit observed below:

"The Court did not give any guidelines as to what degree of involvement might bar a plaintiff other than to decide that the franchising scheme involved in *Perma Life* did not present such a case."¹⁰

"The courts have struggled with this imprecise standard ever since." (Opinion, pp. iv-v).

The decision of the Ninth Circuit below provides an ideal opportunity for this Court to supply its much needed guidance. The facts bearing on the defense have been fully developed by extensive discovery and are undisputed. The District Court found that plaintiff voluntarily and actively participated in and furthered the alleged illegal scheme, and the Ninth Circuit did not question that finding. This case thus presents the very case which the Court pretermitted in its consideration of *Perma Life*.

¹⁰Actually, this Court merely decided that the facts shown on the motion for summary judgment did not present such a case.

This Court should provide that guidance now. The order of the Ninth Circuit precludes Petitioners from obtaining a trial on the defense—a result which this Court did not impose upon even the defendants in *Perma Life*.¹¹ Ironically, it does so in the context of a trial court determination that the plaintiff here was indeed at "equal fault" in the fullest measure of the term. If this action is now remanded for trial, that trial will be wasted should this Court later determine that the District Court applied the correct rule of law in granting the motion for summary judgment. See *Hughes Tool Co. v. Trans World Airways*, 409 U.S. 363, 389-390 (1973) (Burger, C.J., dissenting). Should this Court later determine that the Ninth Circuit was correct in reversing the summary judgment, but incorrect in precluding Petitioners a trial on the issue, two lengthy and costly trials will be necessary.

Moreover, *Perma Life* involved a vertically imposed restraint. In that context the role of the *in pari delicto* defense is plainly small: *Perma Life* effectively eliminates it where the evidence demonstrates that the illegal scheme was "thrust upon" the party seeking damages. This case, however, involves an alleged horizontal conspiracy among competitors. This Court has never considered the defense in that context. In such a context the role of the *in pari delicto* defense ought to be different because the economic strength of the participants is approximately "par" and therefore prohibiting a party at equal fault from suing his brethren would not "undermine" the antitrust laws,

¹¹See 392 U.S. at 140, 142 (Opinion of the Court), 147 (Justice White), 148 (Justice Fortas), 150 (Justice Marshall), and 156 (Justices Harlan and Stewart).

392 U.S. at 139, particularly where, as here, the conduct in issue predates any pronouncement that it may be unlawful.

Indeed, permitting such a party to sue may actually encourage undesirable conduct by offering the unscrupulous the happy choice of adhering to an illegal agreement so long as it proves profitable or seeking treble damages when it is otherwise.¹² Sound public policy should forestall claims by one who has voluntarily made an improvident illegal bargain whatever its origin. As Justices Harlan and Stewart cautioned in *Perma Life*, the law should "decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves." (392 U.S. at 154).

The preclusive effect of the "equal fault" doctrine has heretofore been recognized as an essential attribute of antitrust jurisprudence. The decision of the Ninth Circuit below, which effectively eliminates that defense in the context of an alleged horizontal conspiracy, is unprecedented and makes no sense. However significant the fact of participation in the origination of an illegal scheme, it is a fact rationally incapable of carrying the decisive import with which it is here endowed. For example, one who enters a pre-existing price fixing conspiracy with knowledge of its terms and workings and who thereafter endeavors to further its ends ought not to be free to sue his fellows simply because the scheme might have existed without his participation. A jury—if not the trial judge presented with an uncontroverted fact record—is surely

¹²See the concurring opinions of Justices White, Marshall, Harlan and Stewart in *Perma Life*.

entitled to repudiate such a claimant under proper legal instructions. The rule of law formulated by the Ninth Circuit precludes such a result.

The tremendous increase in complex and costly antitrust litigation in recent years¹³ warrants careful scrutiny of any fresh pronouncements which, like that below, seemingly depart from fundamental principles of justice. We entertain no doubt that the private remedy for antitrust violations serves a salutary purpose in supplementing federal enforcement. But such societal benefits which may accrue thereby should not be so highly prized as to permit distortion of fundamental principles of justice, particularly where the result is as likely to be profiteering by co-equal wrongdoers as it is a closer adherence to the antitrust laws.

One would like to think that illegal horizontal conspiracies are rarely alleged and rarely exist. To the extent that that hope is unrealized, it is of paramount importance that the governing rules fairly assay fault and that those truly of equal guilt not be permitted to profit threefold by their wrongs. We submit that the rule announced by the Ninth Circuit fails of this goal.

¹³During the period 1968 to 1976, for example, the number of civil antitrust lawsuits commenced more than doubled, from 659 in 1968 to 1504 in 1976. *1976 Annual Report of the Director of the Administrative Office of the United States Courts* 97 (1976).

CONCLUSION

As *Perma Life* itself demonstrates, it is imprudent to fashion an inflexible rule for all time and all places. For the reasons set forth above, Petitioners respectfully request that a writ of certiorari be granted to review the Ninth Circuit's endeavor so to do.

Dated, San Francisco, California,

April 8, 1977.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

(Amended: January 13, 1977)

United States Court of Appeals
for the Ninth Circuit

No. 75-1481

Javelin Corporation,	} Plaintiff-Appellant,
vs.	
Uniroyal, Inc., Tire Brands, Inc., Wickland Oil Co., and Big O Tire Dealers, Inc.,	
	} Defendants-Appellees.

[October 12, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: CARTER, LAY,* and WRIGHT, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

This is a private antitrust action alleging violations of the Sherman Act, 15 U.S.C. § 1. Plaintiff Javelin Corporation appeals from a district court order granting summary judgment to appellees. We reverse in part and affirm in part.

*The Honorable Donald P. Lay, United States Circuit Judge, for the Eighth Circuit, sitting by designation.

Facts

In 1962, Tire Brands, Inc.¹ was founded by a group of tire distributors for the purpose of pooling their purchasing power. Tire Brands purchased tires primarily from Uniroyal, which participated in the organization of Tire Brands and produced a tire tradenamed "Sonic" for it. Member distributors were obligated to purchase a minimum quota of tires from Uniroyal to ensure continuous volume purchasing. They also were required to limit their sales to the exclusive territories assigned to them under the group agreement. Sanctions were imposed to enforce these arrangements.

Javelin was founded in 1967 as a wholesaler of tires. Shortly thereafter, Javelin contacted Tire Brands, with a view toward obtaining membership. Javelin initially was poorly capitalized and could not finance its own private brand, thereby necessitating its membership in some form of purchasing group with an identified brand of tires. Javelin was admitted into Tire Brands in 1968, fully aware of and subject to the quota and territory requirements. It considered the exclusive marketing area an advantage.

Unlike its fellow member distributors, Javelin used telephone contact rather than personal sales calls to its customers. This sales method proved extremely successful and Javelin flourished within its exclusive territory. It mar-

¹The organization was originally incorporated as Olympic Distributors, Inc. and subsequently changed its name to Sonic Distributors, Inc. In 1973, the name was changed again to the present Tire Brands, Inc.

keted three brands of its own in 1969 in competition with other members in their territories.

Development of its own brands resulted in a decreasing dependence on the Uniroyal brand. Javelin's annual percent of quota purchased declined continuously. Finally, in 1972, Javelin was expelled from Tire Brands for failure to maintain an acceptable level of quota sales. It is now one of the largest tire distributing companies in the United States.

In 1973, Javelin filed suit in the United States District Court for the Northern District of California in a complaint alleging three counts of violating § 1 of the Sherman Act. Count I alleged a horizontal conspiracy to allocate exclusive territories. Count II alleged a tie-in agreement based on the fact that distributor members had to purchase stock in Tire Brands as a condition of their membership. Count III claimed the defendants had boycotted Javelin by expelling it from the group. Javelin sought treble damages and injunctive relief.

During a preliminary hearing on April 19, 1974, the district court requested the defendants to move for summary judgment based upon Javelin being *in pari delicto* in the acts alleged. The defendants had not requested summary disposition themselves. After briefs were filed and argument heard, the motion was granted and judgment entered on January 15, 1975.

In Pari Delicto

The equitable defense of *in pari delicto* or "of equal fault" as applied to private antitrust suits, was severely restricted by the Supreme Court in *Perma Life Mufflers*,

Inc. v. International Parts Corp., 392 U.S. 134 (1968).² In *Perma Life*, the Court held that "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." 392 U.S. at 140. It was the Court's rationale that preservation of the private antitrust action as "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws" outweighed any inequities that might result should a culpable plaintiff recover a windfall gain. 392 U.S. at 139.

The Court refused to decide, however, whether a plaintiff might ever be precluded from recovery because of its participation in the illegal conspiracy. It stated:

"Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action, for in the present case the factual picture respondents attempt to paint is utterly refuted by the record." 392 U.S. at 140.

The Court did not give any guidelines as to what degree of involvement might bar a plaintiff other than to decide

²The *in pari delicto* defense, at the time of the *Perma Life* decision in 1968, already was not available as a defense in cases involving economic coercion where the plaintiff had no choice but to deal with the defendant and the restraints were largely for defendant's benefit. See *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). It seems clear, then, that the Court intended to go well beyond such a case of involuntary participation in *Perma Life*.

that the franchising scheme involved in *Perma Life* did not present such a case.

The courts have struggled with this imprecise standard ever since. In *Premier Electrical Construction Co. v. Miller-Davis Co.*, 422 F.2d 1132 (7 Cir. 1970), the Seventh Circuit said:

"[W]e believe that *Perma Life* holds only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants." 422 F.2d at 1138.

Thus, only a co-equal in the conspiracy would be barred.

Such a situation faced this court in *Dreibus v. Wilson*, 529 F.2d 170 (9 Cir. 1975). The plaintiff was a co-founder and 50% shareholder of the allegedly wrongdoing corporation. The court adopted the reasoning of the district court's opinion, which stated:

"[E]ven if the establishment of this dealership could constitute monopolization, the plaintiffs cannot recover for it. By their own allegations, plaintiffs are the originating active persons responsible for its establishment. Although the Supreme Court abolished *in pari delicto* as a defense in antitrust cases, the court [sic] indicated that a high degree of involvement in the illegal act could constitute a defense." 529 F.2d at 174 (citations omitted).

The Fifth Circuit in *Greene v. General Foods*, 517 F.2d 635 (5 Cir. 1975), broadly suggested that it would not maintain *any in pari delicto* type defense, but it expressly did not rule on this point. The court stated:

"We have no occasion here to consider to what extent the 'in pari delicto' doctrine will continue to function in private antitrust litigation, if indeed the plaintiff is equally responsible, or a co-adventurer. * * * Even if we accept General Foods' argument that *in pari delicto* and closely related equitable defenses such as consent and unclean hands are still viable after *Perma Life*—an argument we seriously question—the record shows a great disparity between the plaintiff and the defendant" 517 F.2d at 646-47.

Cf. Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5 Cir. 1975) (while no bar, plaintiff's participation may reduce damages).

Other circuits have emphasized that the plaintiff's participation must be in the formulation stage of a conspiracy to bar recovery. In *South-East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767 (6 Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), the Sixth Circuit approved an instruction to the effect that plaintiff could not recover if "equally responsible with defendants in the formation of said conspiracy." 434 F.2d at 784. *See also Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4 Cir. 1971).

Such decisions seem to temper *Perma Life's* apparent abolition of the *in pari delicto* defense. *See* ABA Anti-trust Developments 298 (2d ed. 1975). We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of *Perma Life* and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy.

Accordingly, we hold that summary judgment for the defendant was improperly granted in this case. A plain-

tiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff's participation. To satisfy this test, the jury must necessarily find that the degree of participation of the plaintiff must be equal to that of any defendant and a substantial factor in the formation of the conspiracy. The instigator of an illegal scheme clearly is barred under this test. Whether founding members of a conspiracy are barred is a question of fact for the jury based on the above test.

The "but for" standard places a high burden of proof upon any defendant seeking to bar the plaintiff's suit on the bases of joint participation.³ But the plaintiff is suing not only in its own behalf, but as a "private attorney general" representing the public interest. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9 Cir.), *cert. denied*, 379 U.S. 900 (1964). Congress established the private remedy to enlist the public as enforcers of the antitrust laws. The courts should encourage this function.

In the case at bar, the record establishes that Javelin entered Tire Brands after the group had been in existence for five years. It did not participate in any way in the formation of Tire Brands, to which Counts I and II of the complaint are directed. It is true that Javelin voluntarily sought membership in the group and actively participated in and benefitted by its restraints. But under the standard we set forth above, this degree of participa-

³In adopting this standard, we agree with Justice White, concurring in *Perma Life*, that the problem of who is entitled to recover is one of degree of responsibility posing "the issue of causation in particularized form." 392 U.S. at 146.

tion falls well short of barring Javelin's cause of action. The district court was in error in granting summary judgment based on the *in pari delicto* defense. *Javelin* is entitled to a jury trial on Counts I and II.

Refusal to Deal

The district court properly interpreted Count III as alleging a refusal to deal in retaliation for Javelin's repudiation of the illegal scheme. To state such a claim, Javelin must produce evidence of repudiation. It did not. Indeed, the record shows that Javelin's continuous failure to meet its annual percentage quotas was the basis for its expulsion from the group.⁴

The general standards for granting summary judgment are that the burden is on the moving party to show the absence of any genuine issue of material fact. Fed. R. Civ. P. 56. Moreover, the standard for granting summary judgment is even more rigorous in the antitrust context. See *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In *Poller*, the Court stated:

⁴The district court gave Javelin two opportunities to make out its claim. During a second hearing on the motion for summary judgment, Javelin's counsel admitted that it could make no offer of proof as to repudiation. The record also shows the following record of purchases as a member distributor by Javelin:

Years	Sonic Purchases	Per Cent of Quota
1968	\$ 808,364	77
1969	\$1,225,684	86
1970	\$1,141,159	73
1971	\$ 425,915	24
1972	\$ 395,697	17.6

"We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, [and] the proof is largely in the hands of the alleged conspirators" 368 U.S. at 473.

We find, however, that Javelin's failure to produce evidence of repudiation, coupled with a preponderance of sufficient evidence demonstrating Javelin's continuous failure to meet its annual percentage quotas, permitted the district court to conclude that no material issue of fact exists regarding the alleged retaliatory refusal to deal. The district court's order granting summary judgment as to Count III of Javelin's complaint is therefore affirmed.

Affirmed as to Count III; reversed and remanded for trial as to Counts I and II.

Appendix B

United States District Court
Northern District of California

No. C-73-0153 RHS

Javelin Corporation, a corporation,
Plaintiff,
vs.

Uniroyal, Inc., et al.,
Defendants.

Uniroyal, Inc., a corporation,
Cross-Claimant,
vs.

Javelin Corporation and Javelin Tire
Company of Washington, Inc.,
Cross-Defendants.

[Filed Jan. 15, 1975]

JUDGMENT

This action came on for hearing on defendants' motion for summary judgment on September 27, 1974, and December 6, 1974, and the Court having considered the papers filed in support of and opposition to the motion and having heard the arguments of counsel and good cause appearing,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That defendants' motion for summary judgment be granted and that judgment be entered for defendants dismissing the action.

2. That defendant Uniroyal, Inc. have judgment on its cross-claims and recover of plaintiff Javelin Corporation and Javelin Corporation of Washington, Inc.,

a. On the first cross-claim, the sum of \$42,130.74, together with interest on that amount at the rate of 7% from June 17, 1973;

b. On the second cross-claim, the sum of \$11,692.52, together with interest on that amount at the rate of 7% from April 29, 1973.

3. That defendants recover their costs of suit in amounts to be taxed.

Dated: Jan 15 1975

Robert H. Schnacke
United States District Judge

Supreme Court, U. S.
FILED

MAY 16 1977

MICHAEL RODAK, JR., CLERK

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1976

No. 76-1384

**UNIROYAL, INC.; TIRE BRANDS, INC.; WICKLAND OIL CO.;
BIG O TIRE DEALERS, INC.;**

Petitioners,

vs.

JAVELIN CORPORATION,

Respondent.

**BRIEF OF JAVELIN CORPORATION IN
OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1384

UNIROYAL, INC.; TIRE BRANDS, INC.; WICKLAND OIL CO.;
BIG O TIRE DEALERS, INC.;

Petitioners,

vs.

JAVELIN CORPORATION,

Respondent.

**BRIEF OF JAVELIN CORPORATION IN
OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

This Brief is submitted by respondent Javelin Corporation in opposition to a Petition for Writ of Certiorari filed by petitioners Uniroyal, Inc.; Tire Brands, Inc.; Wickland Oil Co.; and Big O Tire Dealers, Inc.^{1/}

^{1/} Javelin Corporation will be referred to herein as "Javelin"; Uniroyal, Inc. will be referred to herein as "Uniroyal"; Tire Brands, Inc., including its predecessors Sonic Distributors, Inc. and Olympic Distributors, Inc. (Pet. 4 n. 2), will be referred to herein as "Tire Brands"; Wickland Oil Co. will be referred to herein as "Wickland"; and Big O Tire Dealers, Inc. will be referred to herein as "Big O."

REQUEST FOR EXPEDITED DISPOSITION

Javelin requests expedited disposition of this Petition by this Court in light of the following facts. The Complaint herein was filed on January 26, 1973 (R. 1).^{2/} Formal discovery was initiated by Javelin more than four years ago (R. 360) and has not yet been completed. At the invitation of the United States District Court for the Northern District of California, defendants moved for and obtained summary judgment based on the theory of *in pari delicto* (Op. Pet. iii). Javelin appealed to the Ninth Circuit Court of Appeals which reversed in part and affirmed in part (Op. Pet. ix). When Javelin sought to resume discovery after issuance of the appellate mandate, petitioners obtained a stay of discovery. At least one potential witness has died since his participation in the conspiracy of which Javelin complains and before his deposition could be taken. The position of Javelin is that discovery in this case has been delayed long enough.

^{2/}The following abbreviations are used in this Brief:

- | | | |
|----------|---|--|
| Pet. | - | Petition for Writ of Certiorari of Uniroyal, Inc., et al. |
| Op. Pet. | - | Decision of Ninth Circuit Court of Appeals as reproduced in Petition of Uniroyal, Inc., et al. |
| J. Pet. | - | Judgment of the United States District Court for the Northern District of California as reproduced in Petition of Uniroyal, Inc., et al. |
| R. | - | Record on Appeal. |
| B. | - | Brief for Appellant Javelin to Ninth Circuit Court of Appeals. |

Throughout this Brief emphasis has been supplied unless the contrary is indicated.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported officially at 546 F.2d 276 and unofficially at 1976-2 Trade Cas. ¶61,134. Reference herein to the opinion shall be to the pages of the opinion as reproduced at pages i-ix of Appendix A of the Petition. The order of the District Court as set forth at pages x-xi of Appendix B of the Petition is adequate.

JURISDICTION

The jurisdictional requisites as set forth in the Petition are adequate.

QUESTION PRESENTED

The Petition presents no issue worthy of certiorari. The decision below is consistent with relevant principles of law as articulated by this Court and as applied by other courts of appeals. Despite efforts by petitioners to transmogrify *dictum* in the opinion below into a rule "shorn of all antecedents" (Pet. 15), the holding of the Ninth Circuit was simply that "summary judgment for the defendant [*sic*] was improperly granted in this case" (Op. Pet. vi).

If certiorari were granted, the question would be: Does the equitable defense of *in pari delicto* bar the claim of a private antitrust plaintiff against the members of a conspiracy to establish and enforce an illegal *per se* exclusive territorial scheme for the sale of private brand tires where the plaintiff did not participate in the formation of the conspiracy, where the plaintiff was required to submit to

the scheme in order to be permitted to sell such private brand tires, and where the plaintiff was aware of and subject to restrictive aspects of the scheme?

STATUTES INVOLVED

The pertinent provision of the Sherman Act (15 U.S.C. §1) as set forth in the Petition is adequate. The pertinent provision of the Clayton Act (15 U.S.C. §15) is as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This litigation arises from the activities of a group composed of several tire distributors and their tire manufacturing supplier which required member distributors "to limit their sales to the exclusive territories assigned to them under the group agreement" (Op. Pet. ii).

In 1962 Tire Brands was founded as a tire purchasing group by several tire distributors (Op. Pet. ii). At least as early as 1964 the group and its founders agreed to allocate

among themselves exclusive geographic territories for the sale of "Sonic" tires, their private brand (B. 3-4). Uniroyal manufactured "Sonic" tires and supplied them to Tire Brands (Pet. 5).

In 1967 Javelin was founded as a wholesaler of tires. Poorly capitalized at the time, the fledgling corporation needed to become a member of a private brand purchasing group (Op. Pet. ii). Javelin attempted to acquire a dependable supply of private brand tires elsewhere, but the only available supply was through Tire Brands (R. 1446). Javelin was permitted to join Tire Brands and to obtain a supply of tires, but only on the condition that it limit its sales of "Sonic" tires to a restricted territory (R. 1447). By joining Tire Brands, Javelin was able to maintain its then tenuous commercial existence. Thus, in 1968 Javelin was admitted into Tire Brands "fully aware of and subject to" the pre-existing territorial scheme (Op. Pet. ii).

Javelin designed and developed a novel and more efficient tire marketing technique; unlike other Tire Brands members which sold tires through personal calls, Javelin solicited customers and sales by telephone (Op. Pet. ii). Javelin desired to sell tires by telephone from coast to coast, but its requests for permission to sell "Sonic" tires outside of the limited area to which it had been confined were denied. As early as April, 1968, Tire Brands prohibited Javelin from selling *any* "Sonic" tires in Missouri, Illinois, part of Michigan, the Northeast and the Pacific Northwest (R. 15). From 1968 until 1970, Tire Brands restricted Javelin sales of "Sonic" tires to North Dakota, South Dakota, Minnesota, Iowa, Wisconsin and part of Michigan (R. 15). In 1970 the

area in which Tire Brands permitted Javelin to sell "Sonic" in Michigan was even further reduced (R. 16).

Despite the obvious merit of its innovative marketing technique, no Javelin representative ever achieved entry into Tire Brands' control group (R. 962). When Javelin telephone solicitations overflowed the area to which it had been limited, Tire Brands told Javelin to stop them, and Tire Brands' management clandestinely assured other members that if Javelin continued "this kind of trespassing," tire shipments to Javelin would be restricted (R. 17, B. 6-7). In December, 1972, Tire Brands expelled Javelin (Op. Pet. iii) and in January, 1973, after receiving directions from Tire Brands, Uniroyal stopped "Sonic" shipments to Javelin (R. 710-711).

Javelin filed this private antitrust suit in the United States District Court for the Northern District of California on January 26, 1973 (R. 1). The Complaint alleges violations of Sherman Act Section One in three counts. Count One alleges a conspiracy, the terms of which involved establishment of the territorial scheme described by the Ninth Circuit Court of Appeals (Op. Pet. ii), refusal to permit Javelin to sell "Sonics" outside of a limited area, and refusal to deal with Javelin (R. 6-9). Count Two alleged a conspiracy to tie the right to purchase "Sonic" products to the purchase of "Sonic" common stock (R. 9-10). Count Three is not in issue here.

Uniroyal, Tire Brands, Wickland and Big O (defendants below, petitioners here) raised as a defense the notion of *in pari delicto* (Pet. 5, 7). On January 15, 1975, defendants obtained an order granting summary judgment as to all

three counts on the basis of that defense (J. Pet. x-xi). Javelin appealed. On appeal, a three-judge panel of the Ninth Circuit Court of Appeals reversed and remanded for trial as to Counts One and Two and affirmed as to Count Three (Op. Pet. ix).

In reaching its decision as to Counts One and Two, the appellate court below applied the conservative rule that the *in pari delicto* defense does not bar an antitrust plaintiff except "where a plaintiff participated in the formation of the conspiracy" (Op. Pet. vi). The holding is limited to the following:

Accordingly, we hold that summary judgment for the defendant [*sic*] was improperly granted in this case. (Op. Pet. vi)

The reason for this holding is that Javelin was not a participant in the formation of the illegal conspiracy (Op. Pet. vii). In adding that "[a] plaintiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff's participation," the panel apparently sought to clarify guidelines for antitrust application of the "equal fault" defense (Op. Pet. vi-vii). However, the "but for" test which petitioners misconstrue as a holding (Pet. 8, 12) is nothing more than a statement in the opinion because it applies only to participants in the formation of a conspiracy, and the record establishes that Javelin was not such a participant (Op. Pet. vii).

Petitioners now seek review by this Court of mere *dictum* in an appellate decision of a more than four year old case which has yet to be tried.

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISION OF THIS COURT IN *PERMA LIFE*.

Petitioners do not argue that the decision below is inconsistent with the decision of this Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). Instead, petitioners suggest that *Perma Life* "recognizes the importance of preserving flexibility in the application of the *in pari delicto* doctrine" (Pet. 9), but that the Ninth Circuit merely conducted "the simplistic inquiry of whether the agreement would not have been formed but for the plaintiff's participation" (Pet. 12). In this manner petitioners attempt to contrive a conflict where no conflict exists. However, as to the controlling facts upon which they rest and the policy which they advance, the *Perma Life* decision and the decision below are consistent.

1. Facts

Perma Life involved a conspiracy among a muffler manufacturer and a muffler sales organization (among others) to restrain competition by establishing an economic arrangement which included granting each franchised dealer the exclusive right to sell "Midas" products within a defined territory and preventing each such dealer from selling "Midas" products outside of his designated territory (392 U.S. 137). Plaintiffs sought to recover damages they had suffered as a result of the restrictions and defendants raised the *in pari delicto* defense. This Court held in *Perma Life* that *in pari delicto* "is not to be recognized as a defense to an antitrust action" (392 U.S. 140).

The facts which petitioners attempt to use to fabricate an *in pari delicto* defense are consistent with the *Perma Life* facts which were held not to constitute "equal fault." Furthermore, petitioners can adduce no relevant facts or combination of facts of record that were not considered in *Perma Life* and found by this Court not to amount to a defense.

Petitioners assert that Javelin contacted Tire Brands to further its economic interest by joining the preexisting "arrangement" (Pet. 5). The *Perma Life* plaintiffs also had "enthusiastically sought" to join that preexisting arrangement (392 U.S. 138). Petitioners emphasize that "Javelin joined Tire Brands 'fully aware of and subject to' " the scheme, which it considered to be "'an advantage'" (Pet. 6). Likewise, *Perma Life* plaintiffs had "full knowledge" of the restrictive terms in their scheme, and "'solemnly subscribed'" to its terms (392 U.S. 138). Javelin was successful, benefited from the restraints of the group, and requested the right to sell in other areas (Pet. 7). The same was true of *Perma Life* plaintiffs (392 U.S. 138).

2. Policy

Congress has explicitly given a private cause of action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." (15 U.S.C. §15). Private action is "a vital means for enforcing the antitrust policy of the United States" (392 U.S. at 136). The rationale for antitrust preclusion of *in pari delicto* is that private antitrust actions promote the public interest. In *Perma Life* this Court observed that:

[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. (392 U.S. 139)

Each of the four separate *Perma Life* opinions recognizes this policy.

1. Justice White, concurring:

When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with

the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes. (392 U.S. 145)

2. Justice Fortas, concurring in the result:

[Plaintiffs'] right to recover in their own interest and as "private attorneys general" to enforce the antitrust laws cannot be denied on the basis of the doctrine of *in pari delicto*.

* * *

[L]ess-than-equal participation in the crime must not bar [plaintiff] from recovering in his own and the public interest. . . . (392 U.S. 147-148)

3. Justice Marshall, concurring in the result:

I nevertheless agree, *because of the strong public interest in eliminating restraints on competition*, that . . . many of the variations of *in pari delicto* should not be applicable in the antitrust field. (392 U.S. 151)

4. Justice Harlan, with whom Justice Stewart joins, concurring in part and dissenting in part:

A person who engaged in a lawful business on the terms offered should not be prevented from suing merely by his knowledge that others violated the law

in contriving those terms. * * * That is, although a large business with the power to dictate terms and a small business that can only accept them or cease doing business may both, in principle, be liable to legal sanctions for the contract that results from the offer and acceptance, it is considered that the liability is not "*par*," and that the business accepting dictation is only minimally blameworthy. (392 U.S. 155) [Emphasis in original.]

The decision of the Ninth Circuit reflects that very policy:

We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of *Perma Life* and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy. (Op. Pet. vi)

Simply put, *Perma Life* and the appellate decision below are free from pertinent elements of discord.

B. THE DECISION BELOW IS NOT INCONSISTENT WITH ANY POST-PERMA LIFE DECISION OF ANY COURT OF APPEALS IN REGARD TO THE NOTION OF *IN PARI DELICTO*.

Since 1968, when this Court decided *Perma Life*, only nine circuit court opinions, including the opinion below, have mentioned *in pari delicto* as a defense. No such

opinions have been found from the First, Second, Third, Eighth, and District of Columbia Circuits. The appellate decision below is not inconsistent with the other eight relevant appellate decisions. All of these appellate opinions are harmonious with the statement below that there can be no "equal fault," and hence no *in pari delicto* defense, in the absence of voluntary participation by the plaintiff in the formulation of the anticompetitive scheme. The pertinent language of these opinions, organized by circuit, is as follows:

Fourth Circuit:

[W]hen parties of substantially equal economic strength mutually participate in the *formulation* and execution of the *scheme* and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other.

* * *

[One] who *voluntarily formulates* and equally participates in a *non-coercive* agreement . . . cannot maintain an action under §1 of the Sherman Act. . . . [*Columbia Nitrogen Corporation v. Royster Company*, 451 F.2d 3, 15-16 (4th Cir. 1971) (holding that district court committed no error by declining to instruct the jury that counterclaimant could recover on counterclaim if it proved

a non-coercive agreement for reciprocal dealing).]

Fifth Circuit:

1. [T]he plaintiff is representative of the small businessman who acquiesces in or is coerced into a program or pattern of conduct violative of the antitrust laws because of the disproportionate bargaining power of the corporation from which he obtains most of his stock in trade.

* * *

The plaintiff . . . had *nothing to do with the creation of the arrangement*. . . . [Greene v. General Foods Corporation, 517 F.2d 635, 646-647 (5th Cir. 1975) (holding that *in pari delicto* did not bar plaintiff's action where plaintiff did not create arrangement and had inferior economic power), *cert. denied*, 424 U.S. 942 (1976).]

2. [A]n injured party may not be denied any recovery merely because he has participated to the extent of utilizing *illegal arrangements formulated and carried out by others*. . . . [Kestenbaum v. Falstaff Brewing Corporation, 514 F.2d 690, 695 (5th Cir. 1975) (*dictum*) (holding that plaintiff failed to establish

a net economic loss because he failed to prove the extent of benefit from the arrangement), *cert. denied*, 424 U.S. 943 (1976).]

Sixth Circuit:

Recent cases have tended to indicate that for reasons of public policy the defense of *in pari delicto* is not available to a defendant in certain types of antitrust cases. [South-East Coal Company v. Consolidation Coal Company, 434 F.2d 767, 784 (6th Cir. 1970) (approving jury instructions that "if the plaintiff was a *co-initiator* of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages. . . ."), *cert. denied*, 402 U.S. 983 (1971).]

Seventh Circuit:

[P]laintiffs who do not bear *equal responsibility for creating and establishing an illegal scheme*, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants.

* * *

[E]vidence concerning the formation of the agreement including facts pertaining to which party initiated each of its provisions may control the availability of the defense. . . . [*Premier Electrical Construction Company v. Miller-Davis Company*, 422 F.2d 1132, 1138 (7th Cir. 1970) (holding that it was error for district court to grant judgment on the pleadings based on *in pari delicto*, reversing and remanding), *cert. denied*, 400 U.S. 828 (1970).]

Ninth Circuit:

1. We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of *Perma Life* and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy. [*Javelin Corporation v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976), *cert. pending*.]

2. By their own allegations plaintiffs are the *originating, active persons responsible for . . . establishment*. * * * The complaint reveals a degree of involvement so great that it would constitute a defense to an antitrust claim. . . . [*Dreibus v. Wilson*, 529 F.2d 170, 174

(9th Cir. 1975) (holding that plaintiff's great degree of involvement constituted a bar to his claim).]

Tenth Circuit:

1. [P]articipation by a plaintiff in an illegal conspiracy in restraint of trade is not to bar him. . . . [*Semke v. Enid Automobile Dealers Association*, 456 F.2d 1361, 1369-1370 (10th Cir. 1972) (*dictum*).]

2. [T]he defense of *in pari delicto* does not defeat plaintiff's alleged cause of action as inherent in his claim and as a matter of law. [*Sahm v. V-1 Oil Company*, 402 F.2d 69, 72 (10th Cir. 1968).]

In short, as to *in pari delicto*, the appellate decision below is consonant with all other circuit court decisions.

C. THIS CASE IS NOT APPROPRIATE FOR REVIEW ON WRIT OF CERTIORARI.

Javelin brought this action more than four years ago and the case has yet to be tried. Now, at this interlocutory stage, petitioners seek Supreme Court review. However, the decision below has no general importance beyond the facts of this case. The notion of *in pari delicto* as an antitrust defense has atrophied since *Perma Life*. In addition to the nine reported circuit court cases discussed above, only fifteen reported post-*Perma Life* district court opinions have been found which mention the subject. *Perma Life* is not ripe for reconsideration. Petitioners' artifice cannot alter the simple

fact that at present this case is not appropriate for review by this Court.

CONCLUSION

For each and every reason set forth above, the Petition for Writ of Certiorari should be denied.

Dated, San Diego, California, May 6, 1977.

Respectfully submitted,

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